

Consequently, it is impossible to determine from the "data" presented by INTV the extent to which the reported decline in broadcast coverage of college football games resulted from decisions by network affiliates not to carry certain games.⁵ Likewise, INTV claims that there were "only 24 live games broadcast in Tucson" in 1992 (*id.* at 33), and only 10 live broadcasts of college football games in Minneapolis in 1992 (*id.* at 36). These figures appear to be inconsistent with the broadcast network figures reported by INTV in its Further Comments at 27. Thus, INTV's "statistical analysis" of college football telecasts in three selected markets appears to be no more reliable than its Major League Baseball analysis.

B. New Agreements Negotiated By Several Collegiate Athletic Conferences Will Substantially Increase Broadcast Coverage Of College Football Games.

Regardless of the reliability of its narrow "statistical analysis," even INTV concedes that "the proposed break up of the CFA could change this situation." INTV Further Comments at 37. Comments submitted by the broadcast networks and several major collegiate athletic conferences confirm that broadcast coverage of college football games will increase

⁵ For example, INTV claims that despite its duplicative counting methods, only 72 network games were televised in San Francisco in 1992. *Id.* at 30. Given that INTV has reported that ABC broadcast 60 college football games in 1992 and "has affiliates in San Francisco...Sacramento/Stockton...and San Jose" which were included in its San Francisco analysis (*id.* at 27, 29-30), ABC alone should have accounted for 180 games in San Francisco in 1992 under INTV's methodology if each of the affiliates carried each of the games.

substantially in 1996 as a result of new television agreements separately negotiated by conferences which have been CFA members.

Even under the existing CFA agreements with ABC/ESPN, it is not "impossible to broadcast live college football games" at the local level as claimed by INTV. INTV Further Comments at 26. According to Capital Cities/ABC, Inc. ("ABC"), "the overlap provision...relevant to local station telecasts restricts live telecasts on Saturday afternoons of games that begin after 12:10 p.m. local time (or 12:40 p.m. local time, in the case of games involving members of the Southeastern Conference)." ABC Further Comments at 3-4. However, the contract "permits non-ABC telecasts at any time in the home towns of the participating schools." Id. at 4. Finally, because "the local time of the kickoff is controlling, West Coast games can be televised live in the East" within ABC's exclusive window for CFA telecasts in the East. Id.

Of course, nothing prevents a local station from televising CFA college football games played on any day other than Saturday. Likewise, innumerable college football games involving other collegiate athletic conferences and schools remain available for broadcast as well, but it appears that only regional cable sports networks have expressed interest in televising those games. See, e.g., Further Comments of the Southland Conference at 2 (although HSE has provided regional

cable coverage of "several football games involving Conference schools," at least one of which "was picked up by Prime Network for national cable distribution as well," the Conference "continues to be unable to obtain broadcast station and/or network coverage of Conference sports events"). Notwithstanding INTV's contrary claims, local stations are afforded opportunities to provide live coverage of college football games even under the current CFA television package.

However, new agreements reached by several conferences which currently are CFA members will significantly increase national broadcast coverage of college football games and opportunities for local broadcast coverage. ABC reports that it has reached agreements in principle with the Atlantic Coast Conference ("ACC") and the Big Eight "for broadcast of these conferences' home games starting with the 1996 college football season." ABC Further Comments at 5. Both agreements are "exclusive as to other over-the-air television broadcast networks." However, the Big Eight agreement allows for local broadcasts of conference games at any time other than the ABC "telecast time period," which is primarily 3:30-7:00 p.m. on Saturdays. Id. at 6. The ACC agreement contains similar opportunities for local broadcast of ACC conference games, with certain additional start time restrictions for syndicated broadcasts. Id.

The Big East Football Conference ("BEFC") reports that it has reached an agreement with CBS to provide network

broadcast coverage of BEFC games beginning in 1996. BEFC Further Comments at 4.⁶ BEFC contends that the new CBS agreement "will substantially expand television broadcast coverage of BEFC games." Id. ESPN confirms that the trend towards individual conference television packages will maximize broadcast and cable distribution of college football:

If history is a guide, the sale of television rights at the conference level will result in the continued wide-spread distribution of college football telecasts by multiple national, regional and local outlets. College basketball, where most deals are made at the conference level, has followed this pattern and the Commission has noted with approval as regards this proceeding the telecasting patterns in that sport.

ESPN Further Comments at 6.

In short, developments since the Commission's Interim Report confirm that college football games currently available on broadcast television are not likely to "migrate" to cable. See Interim Report at ¶¶59, 61-62. New agreements executed by various collegiate athletic conferences will increase substantially the number of major college football games available on broadcast television.

IV. Anti-Siphoning Regulations Are No More Defensible Under HBO Today Than They Were In 1977.

The Commission has requested comment on its authority to adopt "sports siphoning rules" under the decision of

⁶ ABC states that CBS has reached a similar agreement with the Southeast Conference ("SEC") for network coverage of SEC football games beginning in 1996. ABC Further Comments at 5.

the Court of Appeals in Home Box Office, Inc. v. F.C.C., 567 F.2d 9 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977) ("HBO"), which invalidated the Commission's previous anti-siphoning rules. Further Notice at ¶11. INTV maintains that HBO does not preclude sports siphoning rules because that decision "reached several poor conclusions, based on data that is no longer accurate." INTV Further Comments at 38. Consequently, INTV concludes that the courts would uphold "detailed anti-siphoning rules dealing exclusively with sports events... in light of the market forces that now drive the industry." Id. at 39.

However, INTV provides no evidence that any material "data" relied upon by the Court in HBO are "no longer accurate." INTV acknowledges that the Court's decision in HBO was based in part on "the lack of evidence that siphoning was occurring," but claims that it has presented "evidence" in this proceeding which "is more than sufficient to justify sports siphoning rules." INTV Further Comments at 40-41. INTV's "evidence," however, is contradicted by the Commission's tentative conclusion that "the record does not at this time reveal a migratory trend towards cable, either overall or in individual sports" (Interim Report at ¶85), and the record developed in response to the Further Notice overwhelmingly supports that conclusion.

INTV also claims that "the exponential growth of cable" since 1977 would justify imposition of anti-siphoning

rules because the Court concluded in HBO that "extension of cable service with cablecasting capability to the country as a whole does not seem possible in the immediate future." See INTV Further Comments at 40, quoting 567 F.2d at 24. However, despite cable's growth, the Court's observation about the universal availability of cable remains true today.⁷ Moreover, the HBO Court struck down sports siphoning rules notwithstanding concern that exclusive cable coverage of sports events would render them unavailable to all but the small portion of the American public that had access to cable in 1977. See 567 F.2d at 24 (of "70.1 million American homes with television sets" in 1975, only 9.8 million "had access to some cable system"). INTV fails to explain why the availability of such cable programming to a substantially greater portion of the American population in 1994 should now justify anti-siphoning rules.

More importantly, INTV does not attempt to address other critical issues identified by the HBO Court in rejecting sports siphoning rules. Even if it assumed that substantial

⁷ Although cable television now passes over 90 percent of the nation's homes, INTV repeatedly has stressed in this proceeding that cable still does not reach all American households served by broadcast television and that approximately 40 percent of homes passed by cable elect not to receive it. See, e.g., INTV Further Comments at 4 ("Every game that appears on a basic cable channel means that approximately 40 percent of the American public will be denied access to the game"); Id. at 9 ("exclusive cablecasts automatically eliminate approximately 40 percent of the American public"); Id. at 21 (cable carriage of sports events "disenfranchise[s] 35-40 percent of the American public").

siphoning of sports programming was occurring, the Court questioned "whether the result of [such] siphoning would be to lower the quality of free television programming." 567 F.2d at 25. The Court noted that, absent evidence regarding the nature of, and level of audience satisfaction with, the broadcast programming which replaced the allegedly "siphoned" sports programming, there was no reasonable basis upon which the Commission could: (a) define the current level of broadcast sports programming as the "minimum level consistent with adequate [broadcast] television service" to the public; or (b) establish that decreases in sports programming by broadcast stations "represent siphoning any more than they represent editorial or commercial judgment."⁶ 567 F.2d at 32, 51. INTV provides absolutely no factual information to address these basic issues identified by the HBO Court. Thus, there is no reason to believe that sports siphoning regulations would be any more defensible under HBO today than they were in 1977.

Conclusion

After four rounds of comments and reply comments over a two-year period, the Commission has received no substantial evidence of any "migratory trend towards cable,

⁶ For example, it has been reported that "there were fewer bidders" for Major League Baseball "because more independents were keeping their prime time schedules open in anticipation of hooking up with one studio or the other." J. Cooper, Local Rights Hit \$375 Million, Broadcasting & Cable, Mar. 14, 1994, at 35.

either overall or in individual sports." Instead, commenters have provided compelling data consistently confirming stable or increasing carriage of sporting events on broadcast television. Consequently, the Commission should terminate its inquiry and report to Congress that neither legislative nor regulatory action to limit sports "migration" is necessary or appropriate.

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Respectfully submitted,

AFFILIATED REGIONAL
COMMUNICATIONS, LTD.

By David B. Gluck
David B. Gluck
Mark R. Boyes
600 Las Colinas Boulevard
Suite 2200
Irving, Texas 75039
(214) 401-0099

Its Attorneys